

EXHIBIT 3

1 IN THE UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF OHIO
3 EASTERN DIVISION
4

5 IN RE: NATIONAL PRESCRIPTION MDL No. 2804
6 OPIATE LITIGATION

7 THIS DOCUMENT RELATES TO:
8 TRACK 12.

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11 TRANSCRIPT OF STATUS CONFERENCE HELD BEFORE
12 SPECIAL MASTER DAVID COHEN
13
14

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18 Taken remotely via teleconference
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1 P R O C E E D I N G S

2
3 SPECIAL MASTER COHEN: Hello
4 everybody. This is David Cohen. I was
5 waiting for the beeps to stop. It's
6 like popcorn. I finally turned off the
7 microwave. So thank you all for getting
8 on the phone. I'm sure that there are
9 quite a number of folks who are on, and
10 of course for the court reporter, you
11 should make sure that you identify
12 yourself each time before you speak.

13 I'm sure that she's good at
14 differentiating voices, but it will
15 still help her.

16 As I noted, I'm going to record
17 this myself. I don't know, Pam, if
18 you're doing that, but I'll do it as
19 well and I'll start right now.

20 Okay. And I also am going to
21 guess that there are maybe many, many
22 attorneys on the phone, probably north
23 of 25; but that at least as to any given
24 issue, there are probably just one or
25 two on each side who will be addressing

1 it and so, as I suggested in my emails
2 to you all, I really am doing this at
3 this juncture just to kind of listen in.
4 I want to sensitize myself to what the
5 issues are, get a feeling for what
6 resolutions you've already reached, what
7 resolutions you may be close on but
8 maybe just need a suggestion or two, a
9 little help that I can mediate as I have
10 done really since the beginning of this
11 MDL seven years ago; and then to the
12 extent that we can identify issues where
13 you're just not going to come to
14 agreement, then we can get that teed up
15 one way or another.

16 So with that introduction, I'm
17 really going to try and, as I said, just
18 listen in and, I don't know, I guess
19 that it has mostly been plaintiffs who
20 have been asking for resolution of
21 objections made by defendants to
22 plaintiffs' discovery.

23 My sense is that there will also
24 be defendants who want resolution of
25 plaintiffs' objections to defendants'

1 discovery, but that's running a little
2 bit behind just given the timing of
3 production of responses.

4 So having said that, I'm also
5 guessing that it is probably appropriate
6 to ask plaintiffs to begin and identify
7 whatever issues you've already been
8 discussing and go forward with that
9 discussion while I listen in and if
10 there are some that should be directed
11 the other way, then we can get to that,
12 too.

13 I'm guessing maybe that Paul
14 Farrell or Peter Mougey have been at the
15 forefront, or Peter Weinberger, but I'll
16 let you take it from there.

17 MR. FARRELL: Hi. Good
18 afternoon. For the record, this is Paul
19 Farrell. Can you hear me okay?

20 THE REPORTER: Yes.

21 SPECIAL MASTER COHEN: Yes.

22 MR. FARRELL: Okay. The genesis
23 of the recent discussions and where we
24 currently are is on December 29th, 2023
25 the PEC served 35 discovery requests

1 upon the two PBM defendants, Optum and
2 ESI, and I'll refer to them collectively
3 with their subsidiaries and we'll get to
4 that issue later.

5 The title of the document is
6 Plaintiffs' Combined Discovery Requests
7 to Defendant Pharmacy Benefit Managers,
8 First Set Relating to Initial Discovery;
9 and just like the previous iterations of
10 this litigation, sometimes it takes a
11 little bit of a nudge to start the
12 dominos to fall and I think that the way
13 that I had attempted to frame it is that
14 the first discussions we've had are on
15 geographic scope and temporal scope, and
16 both issues have been addressed in the
17 past in this litigation through
18 discovery ruling 2, which is docket 693,
19 and discovery ruling 3, which is docket
20 762.

21 We had a discussion yesterday,
22 and I think I'll just start with the
23 easy one, which is geographic scope, and
24 I think that it's fair for me to
25 characterize that the plaintiffs and the

1 PBMs have agreed that properly framed
2 discovery 1 category has a nationwide
3 geographic scope and that those
4 questions that we ask that fall within
5 category 2 would have a smaller
6 geographic scope which is yet to be
7 determined whether it is regional, state
8 or bellwether specific. We haven't got
9 to those discussions yet.

10 So yesterday we walked through
11 the 35 questions to see where we had
12 agreement and disagreement, and for the
13 most part we have universal agreement on
14 some of the questions being category 1,
15 and then we have universal agreement on
16 most of the remaining questions that
17 have a category 1 and a category 2
18 component and what we have agreed is
19 that to the extent that we eventually
20 see documents, that we can make a better
21 understanding as to whether or not the
22 productions are, should be nationwide or
23 they should be limited to specific
24 geographic areas.

25 By way of example -- let me see

1 if I can find a good one. Question
2 number 28 states: Please identify all
3 presentations you have given related to
4 the opioid epidemic and/or opioid
5 utilization, abuse and/or diversion and
6 produce a copy of the same.

7 The position that we've taken is
8 that if in fact there are national
9 presentations, if there are documents
10 responsive to this for, on a national
11 scope, obviously we think that's in
12 category 1.

13 The defendants rightfully pointed
14 out that there could be hundreds of
15 presentations performed not with a
16 national scope but on a restrictive
17 geographic area, say for a client in
18 Kansas, and we have agreed to reserve
19 judgment on whether or not those are
20 category 1 or category 2 depending on
21 the scope of document that we receive
22 with question number 28.

23 If question number 28 produces
24 zero results, then we'll go back and
25 have a discussion as to why we've missed

1 that or why, you know, there is a
2 limited subset. So the geographic scope
3 I don't think is controversial.

4 The temporal scope is
5 controversial and this is where I think
6 that yesterday we kind of hit a
7 loggerhead.

8 What the plaintiffs' position is
9 is that under discovery ruling 2 and 3
10 that the case against the PBMs is more
11 akin to the allegations against the
12 manufacturers, which this court has
13 determined that temporal scope as a
14 baseline goes to a year before the
15 launch of each product: So if a
16 manufacturer launched a product in 1996,
17 the temporal scope was a year prior to
18 launch. If the temporal scope -- if the
19 launch was in 2012, then the temporal
20 scope was a year before that launch.

21 The PBMs argue that there should
22 be a later date on temporal scope, and I
23 don't know that any further discussions
24 between us is going to make a
25 difference; so that's one of the reasons

1 why I asked for this meet and confer
2 with, David, you serving as sort of a
3 guide to us that it leads us into the
4 process that we need to engage in to
5 ripen this to bring it to your attention
6 for resolution.

7 I think the only complicating
8 factor to this is that the PBMs argue
9 that until the motion to amend is
10 granted or denied, it impacts their
11 position on temporal scope; so for
12 instance, if this court refuses any
13 amendment to allow a marketing claim
14 despite we allege there are marketing
15 claims, then that may have some impact,
16 and we concede that there's some merit
17 to that.

18 That being said, we believe we've
19 properly pled the complaint and that
20 we've properly brought in allegations of
21 contractual relationships between the
22 PBMs and specifically Purdue Pharma
23 dating back to the launch of OxyContin
24 and so we're asking for a baseline
25 temporal limitation of January 1, 1996.

1 And with that, I think I'll leave
2 it to the defendants if they'd like to
3 make any comment.

4 MS. MCGOWAN: This is Emily
5 McGowan for OptumRX. I have some
6 initial responses to what you just
7 shared, Paul. And then I think Olga for
8 Express Scripts may have proposed a path
9 forward today but it really does seem
10 that plaintiffs are taking the position
11 that all the prior discovery rulings,
12 and you've mentioned DR 2 and 3, apply
13 to the PBMs and our position is that
14 they don't.

15 The PBMs were not active MDL
16 defendants until recently and they
17 weren't in the tracks where those orders
18 were issued. I'm looking at DR 2 and 3
19 now and they say on their face this
20 document relates to Track 1 cases.

21 Not only that, just as recently
22 as December Judge Polster recognized
23 twice that the PBMs are not bound by any
24 of those rulings, both orally at the
25 December 1st hearing when he said -- and

1 this is a quote -- "they're not
2 technically bound by them" and then in
3 his December 11th order resolving
4 bellwether disputes, the PBM defendants
5 are not bound by prior rulings to which
6 they were not a party. So just at the
7 outset, those rulings are not binding on
8 the PBMs.

9 Taking the position that 1996 is
10 the relevant year for discovery as a
11 blanket position is also just
12 inappropriate for the case. So setting
13 aside the fact that the PBMs weren't in
14 those tracks, if you actually look at
15 the discovery that went back to 1996,
16 it's relatively limited and in fact for
17 most other discovery, the year was 2006
18 and so again we're not hearing
19 justification for any discovery prior to
20 2006.

21 What we heard yesterday relates
22 to entities that are not in the current
23 cases and we explained that going
24 forward with this meet and confer today,
25 given that issue, was premature but

1 that's the only reasoning we've heard
2 for going back to 1996. And then just
3 speaking for OptumRX now, and I know
4 we've explained this at least in Lincoln
5 County, if not to this team, OptumRX was
6 a very small company before 2015 so
7 there's just a reality that there are
8 not going to be significant materials
9 predating 2010 or 2006 and certainly not
10 back to 1996 and so there's sort of a
11 functional problem as well.

12 So with those overarching points,
13 Olga, did you have some comments as
14 well?

15 MS. VIEIRA: Yes. So I would
16 just piggyback off that last comment.
17 For Express Scripts we have -- this is
18 Olga Vieira, for the record, and I
19 represent Express Scripts.

20 So for Express Scripts, we will
21 also have limitations on the documents
22 and data that we have available, what is
23 reasonably accessible and what is not;
24 and so I guess my thought in terms of
25 this meet and confer is sort of setting

1 that aside for now and just speaking
2 theoretically on what the date range
3 should be and then we can talk about
4 burden and accessibility of the
5 documents afterwards; but our thinking
6 had been when it comes to the PBM
7 related claims, which is the only claims
8 that are currently in the dispute, we
9 think that it would be appropriate to
10 take the Court's ruling that was
11 implemented in 2018 regarding the
12 distributors and the pharmacies and set
13 a time frame of 2006; and we thought
14 since that was done in 2018 and now
15 we're in 2024, we should push it up to
16 2012 and that would give you the same
17 date range or the same time frame and
18 reduce the burden that would exist for
19 us now going back, six years later going
20 back the additional six years and that's
21 where we came up with the 2012 time
22 frame, and that would be for all of the
23 PBM associated claims.

24 And then as we discussed
25 yesterday, to the extent that, you know,

1 the complaints are amended and there are
2 certain allegations included in the new,
3 in the amended complaints that are
4 relevant to relationships with the
5 manufacturers, then perhaps we can talk
6 about that as a separate category of
7 documents and which documents would fall
8 into those allegations and what time
9 frame would be appropriate for that.

10 Not necessarily agreeing that
11 1996 would be the right time frame; but
12 just thinking of it as two different
13 sets of documents and as we, we could go
14 through the different requests how we
15 did yesterday with the time frames and
16 say okay, this would clearly be, you
17 know, more PBM related and so the time
18 frame would be a later time frame. This
19 would be something that would touch on
20 the relationship with manufacturers, so
21 that might be something that we would
22 want an earlier time frame on; and if we
23 could categorize that, the requests that
24 way, then perhaps we can have, like make
25 some progress in the discussions while

1 we await for the Court's ruling on the
2 motion to amend and then speak about
3 time frames once we've decided which
4 categories fall into which.

5 I think, you know, reviewing some
6 of the prior rulings from this court,
7 the Court took, I think quoting, a
8 surgical approach, and I think that's
9 something that we would think would be,
10 would work well here, right? Is looking
11 at the different categories and the
12 different types of documents and saying
13 okay, this type of document we can
14 probably go back further. This type of
15 document we can't, and just going on a
16 more case-by-case basis with the
17 categories of documents instead of
18 trying to put in a blanket 1996 or even
19 2006 deadline.

20 SPECIAL MASTER COHEN: This is
21 David. Let me just make some comment
22 and a suggestion.

23 First of all, as to prior
24 discovery rulings by me and the Court, I
25 agree with you that the Judge said that

1 at least to some extent there are
2 certain rulings that because the PBMs
3 weren't involved at the time are not
4 binding on the PBMs, and my
5 recollection, which is probably not
6 entirely clear, is that the Judge was
7 talking for sure about, for example,
8 motions in limine. I'm not sure that
9 the Judge was talking about discovery
10 motions. Maybe he was. But at the very
11 least, any discovery rulings are
12 precedential. It doesn't mean that
13 they're necessarily binding. They may
14 be or they may not be, but they're
15 certainly precedential and the parties
16 should look at them as strongly advisory
17 as to what the Court has been thinking
18 including that it intends to be surgical
19 as much as it can.

20 But, for example, there is no
21 question but that DR 22, which is the
22 discovery ruling, applies to the PBMs.
23 It says so by its terms that it applies
24 to all defendants, and subsequent
25 discussions of DR 22 clarifications and

1 amendments all make it clear that it
2 applies to, quote, "all defendants in
3 the MDL," so I would just observe that
4 taking the position that none of it is
5 binding on PBMs might be a bit too
6 strong. I'm not saying you're wrong.
7 I'm just also saying that you shouldn't,
8 you know, ignore them out of hand.

9 The other thing I would observe
10 is this: So I think that the parties
11 agree that depending on what the Judge
12 rules on the motions to amend is going
13 to kind of change the analysis; but so
14 fine. You know, I have always taken and
15 will continue to take the position that
16 you can roll this out. You can do it a
17 bit at a time unless it's actually more
18 efficient to wait, and maybe it is.
19 Sometimes it will be, but sometimes it's
20 more efficient to just get going; and so
21 if it is true that the parties simply
22 disagree on those issues that are
23 currently in the case as pled and there
24 is no room for, or the parties don't
25 believe that there is going to be any

1 resolution of that comprise, surgical or
2 otherwise, then I want to get position
3 papers, position letters now.

4 Start writing them and show me,
5 tell me what the issues are and I'll
6 tell you what I think and if you, if any
7 party disagrees with me, they can ask
8 that it be formalized and we'll go
9 through the process we've been going
10 through the last seven years. But let's
11 get going here. I mean, that's my
12 function is to get these issues resolved
13 as quickly as possible, so I don't --

14 MR. BOONE: Special Master --

15 SPECIAL MASTER COHEN: I don't
16 know if you're at a position yet where
17 you can't agree any further; but if you
18 are, then I need to start seeing the
19 issues.

20 Go ahead, Brian.

21 MR. BOONE: Yeah, sorry. This
22 is Brian Boone for OptumRX.

23 I just wanted to clarify a couple
24 things: You are not making any rulings
25 today, correct, about any issues?

1 SPECIAL MASTER COHEN: That is
2 correct.

3 MR. BOONE: Thank you.

4 SPECIAL MASTER COHEN: I'm not
5 going to make any rulings on any of this
6 stuff unless it's clear; but, no,
7 generally my practice, Brian, is that
8 I'm not going to rule on anything
9 without receiving some kind of written
10 position -- it might be an email, it
11 might be a formal letter, it might be a
12 formal motion -- so that I can have time
13 to digest it and think about it.

14 MR. BOONE: Understood. Thank
15 you.

16 And I know you had just talked,
17 started talking about the process, and I
18 wanted to talk about the process because
19 the PEC invited you to this meeting
20 before the parties had even spoken about
21 the PBMs' objections. We had a call
22 with Paul and the PEC yesterday. That
23 was the first time that we had talked
24 since serving our objections, and it
25 lasted about an hour.

1 And by the way, Paul made it a
2 point on that call to explain that he's
3 not accustomed to losing in this
4 litigation, so they were essentially
5 saying we don't need to meet and confer
6 because we're going to win. That is
7 improper. If they think there's --

8 SPECIAL MASTER COHEN: He may
9 not be accustomed to it, but it's
10 certainly happened and nobody should
11 feel like they win everything or can
12 expect to win anything; so you don't
13 need to worry about that.

14 If there's one thing that I hope
15 you will eventually conclude is that I
16 give everybody a chance to say what they
17 need to say and that I'm fair in the
18 end.

19 MR. MOUGEY: Yeah. This is Peter
20 Mougey. I was going to sit and not say
21 anything. That was, that comment was
22 totally inappropriate. That was a
23 comment made in jest during -- there
24 were a lot of jokes made during that
25 meet and confer and that was a comment

1 that was made about that Paul picks his
2 battles is what the gist of that was and
3 that was inappropriate and uncalled for.
4 And that was, I didn't want to leave
5 this conversation, Special Master, with
6 that being the, that you think that
7 Farrell's pounding his chest and he's
8 never lost and that's why we're not
9 meeting and conferring. That's totally
10 inappropriate.

11 MR. SHKOLNIK: If I could just
12 say one thing, Special Master. This is
13 Hunter Shkolnik.

14 Can I just say one thing --

15 MR. BOONE: This is Brian Boone.
16 Let me just respond to that. No one on
17 our side said --

18 MR. SHKOLNIK: No, Brian, can I
19 just respond to what you said please?
20 And then respond to all of us?

21 As the law firm that has probably
22 more bellwethers than any other firm in
23 this MDL, I can attest to the fact that
24 we do not win everything and to even
25 suggest that is, you know, really just

1 inappropriate here.

2 And why don't we just stick to
3 the issues here instead of this type
4 of --

5 SPECIAL MASTER COHEN: Let's not
6 get sidelined by that.

7 Brian, I accept your
8 representation that you didn't mean
9 anything by it. Let's get to the
10 essence and the issues.

11 And are there any other issues
12 besides geographic that we should be
13 talking about?

14 MR. BOONE: If I could just add
15 one thing, Special Master Cohen, that I
16 was going to say before the others
17 interjected.

18 If they think there's a ripe
19 dispute -- and it sounds like this is
20 what you're saying -- then they can file
21 a motion to compel and we can brief it.
22 That's what Rule 37 requires.

23 And of course we'll be talking
24 along the way and we're always going to
25 meet and confer in good faith and I'm

1 sure you'll come to see that is true of
2 our side.

3 But if they think there's a ripe
4 dispute, they need to file a motion to
5 tee it up and that's not --

6 SPECIAL MASTER COHEN: Right, and
7 they can file --

8 MR. BOONE: They invited you to
9 the conversation even before the parties
10 really had a chance to speak about most
11 of it.

12 SPECIAL MASTER COHEN: And
13 that's why I made clear that I wasn't
14 going to be ruling on anything and that
15 I'm really just mostly listening, you
16 know, making suggestions.

17 To be fair, you know, this is the
18 process, Brian, that over the last seven
19 years we have engaged in:

20 The parties have called and said
21 okay, here's our dispute, and we got to
22 it. Right? It started out pretty much
23 with formal written motions and then
24 eventually the parties realized that
25 things were easier, quicker, less

1 expensive for their clients to do that
2 via position letters to me. Still
3 formal, still written, still lengthy,
4 still very thorough, but via letter and
5 as time progressed and everybody got
6 more comfortable with each other, we
7 would sometimes simply get on the phone
8 and say okay, here's the issue. We
9 pretty much agree that we each could be
10 wrong or right. What do you think,
11 David? And I would say it. And if
12 somebody decided that they weren't
13 satisfied with that, then we'd get to
14 the written stuff and go from there.

15 So I recognize that the PBMs are
16 essentially new to the litigation and
17 that it may take some time for us all to
18 get comfortable with each other; but in
19 any event, there will never be a case
20 where the parties don't get to present
21 their position in writing if they need
22 to or want to and we'll take it from
23 there. So that's the way it's going to
24 go forward.

25 MS. VIEIRA: This is Olga Vieira

1 for Express Scripts. I guess it's, the
2 question is to Paul: Do you want to do
3 with, like we did yesterday? I think
4 this may be helpful, and perhaps more in
5 your court than in mine, to go through
6 the 35 requests and let us know which of
7 those requests you think would fall into
8 what you would position as the 1996
9 bucket and then what you would position,
10 I think yesterday you called it the
11 transactional, that could be a bigger
12 bucket and just to kind of start setting
13 a framework for what you think you need
14 would be really, really far back and
15 what you think you could live with in a
16 closer time frame, again not making any
17 agreements or concessions but just
18 trying to categorize them in the way
19 that we did yesterday with the
20 geographical scope?

21 MR. FARRELL: So this is Paul
22 Farrell.

23 Let me start by saying this:
24 With regard to Brian Boone's comment,
25 it's not even worthy of response from

1 me. Number 2 --

2 SPECIAL MASTER COHEN: Good.

3 Let's get past it.

4 MR. FARRELL: Number 2 is I'm not
5 interested in going through the 35
6 requests and parsing out the burden as a
7 factor that goes into the temporal
8 scope.

9 As I explained yesterday, just
10 like with discovery ruling 3, I would
11 like the court to make a declaration as
12 to what the baseline is for the temporal
13 limitation and then from that baseline,
14 if one or more of the defendants have a
15 particular argument about availability
16 or accessibility, then we can have that
17 discussion.

18 The reason it's a little more
19 complex is because, as Optum pointed
20 out, their existence was small at some
21 point in time in the past but they are
22 currently now a result of several
23 mergers and acquisitions over time and
24 so some of our discovery requests are
25 asking for you to identify the history

1 of your mergers and acquisitions.

2 The reason being, by way of
3 example, ESI acquired Medco and so we
4 have asked a question about predecessor
5 liability. If Medco was in a contract
6 with Purdue Pharma in 1996 and engaged
7 in marketing conduct or engaged in
8 conduct that we believe is actionable
9 and ESI acquired Medco including its
10 liabilities, then I think the limitation
11 of ESI's documents is only one factor
12 that goes into it and we would like to
13 know whether or not you have Medco
14 documents.

15 So setting a baseline like we did
16 in discovery ruling 3 allows us to say
17 this is where we begin the assessment
18 and then it allows you to come back in
19 your responses and say: After a
20 diligent search, we don't have any
21 documents that precede, you know, 2004.
22 And that's exactly what we did with the
23 manufacturing case, that's exactly what
24 we did with the distributor case and
25 it's exactly what we did with the

1 pharmacy case.

2 By way of example --

3 MS. VIEIRA: It --

4 MR. FARRELL: By way of example,
5 McKesson, AmerisourceBergen and Cardinal
6 Health each had transactional data going
7 back in time to different places and
8 they put that on the record and they
9 disclosed what they had and we examined
10 it and we tested it and prodded it and
11 it turned out to be true.

12 There are other instances where
13 upon prodding and pushing,
14 AmerisourceBergen came up with documents
15 that went back to '98. So that's why
16 what jumped out of the gate for us was
17 question number 14 that we served which
18 asked the defendants, the PBMs, to
19 identify in chronological order and
20 produce all contractual agreements with
21 the manufacturers of prescription
22 opioids.

23 Your position that this goes back
24 to 2012 or maybe even to 2006 belies the
25 point that we have through Purdue

1 discovery a contract between Express
2 Scripts and Purdue Pharma. It's Bates
3 stamped PDD, as in papa delta delta,
4 1701198993. So, you know, it's dated
5 April 17th, 1997 and it's retroactive to
6 January 1st, 1997 and so we know there's
7 evidence of direct contracts between
8 Purdue Pharma and Express Scripts on
9 OxyContin and we believe the baseline
10 should go back, and I just don't
11 understand -- I don't believe that going
12 through and seeing any other documents
13 without parsing through the 485 pages of
14 objections, why it -- I don't believe
15 it's an efficient use of time to debate,
16 you know, what the temporal limitations
17 should be on a question by question
18 basis. And that's why we're asking for
19 a baseline.

20 MS. VIEIRA: But, Paul --

21 SPECIAL MASTER COHEN: Can I ask
22 a question please? This is David.

23 So the baseline date, as I
24 recall, was set in connection with a
25 specific, and I'm talking about the

1 former cases, Track 2 and Track 3, was
2 set based on the introduction of a
3 specific drug and went from there and
4 when I look at request number 14, which
5 is asking about contractual agreements,
6 that's not related to a drug.

7 I'm trying to understand if
8 that's the argument that's being made,
9 what you're basing the beginning date
10 off of. It sounds like it's not the
11 date that a drug was first marketed,
12 it's something else, at least in regard
13 to that question.

14 MR. FARRELL: Yeah. So that's a
15 fair point. We did not receive any
16 documents from ESI based on question
17 number 14. What we received was
18 reference to the DR 22 production that
19 was in a different litigation and when
20 we went back and looked at those
21 documents, what we see is that ESI
22 entered into particular contracts with
23 Purdue Pharma on particular drugs; so
24 the documents that I just referenced to
25 you is the rebate and reimbursement

1 agreement between Purdue Pharma and ESI
2 specifically related and exclusively
3 related to OxyContin.

4 SPECIAL MASTER COHEN: Okay. I
5 see. So are you suggesting then that
6 the dates should still apply to a
7 specific manufacturer's products as to
8 that manufacturer's contracts for
9 example?

10 MR. FARRELL: Yes. The language
11 that we, the contracts that we're
12 interested -- well, no, not necessarily
13 because here's the thing is we also have
14 seen contracts between ESI's former
15 subsidiaries and Purdue Pharma that
16 isn't related to prescription opioids,
17 it's related to letters written to --
18 OxyContin letters written to doctors.

19 We've also seen that they have
20 particular data transfer agreements with
21 Purdue Pharma; and so the question was
22 written broadly enough for us to get our
23 arms around to define what types of
24 relationships ESI and its predecessors
25 had with Purdue Pharma and that's why we

1 think that at least looking at question
2 number 14, if we can define the scope of
3 the interrelationship between the
4 prescription opioid manufacturers and
5 ESI, it gives us some better baseline to
6 begin the discovery process.

7 I'm not suggesting that we need
8 the contracts related to insulin. I
9 intended number 14 to be agreements with
10 the manufacturers of prescription
11 opioids related to prescription opioids.

12 MS. VIEIRA: And, again, this is
13 Olga for Express Scripts.

14 This is why I suggested, as we
15 did yesterday very successfully, to go
16 through the categories of documents.
17 This is -- you've mentioned one out of
18 35 where you think the date range should
19 go back further and you have your
20 reasons for that.

21 A lot of that has to do with your
22 proposed amended complaint that has
23 allegations about a conspiracy and RICO
24 and all sorts of things which may or may
25 not even happen in this case; and so

1 there are other categories of
2 information such as claims data, for
3 example, which I believe you would
4 consider to be transactional and I don't
5 believe you think it needs to go all the
6 way back to 1996. I could be wrong; but
7 to the extent your request calls for
8 some of that information that you would
9 agree with me does not need to go back
10 to 1996 off the top, then we can just go
11 through and have some sort of agreement
12 on here we're going to wait until the
13 amended complaint or here we definitely
14 want it. Here we're okay with, you
15 know, the 2012 or even 2006, something
16 around that range.

17 And I think it just, it was very
18 productive yesterday to do this with
19 geography. You know, we came to
20 agreements that were different from the
21 position you had originally taken and
22 different from the position that we had
23 originally taken and so that's why I
24 think this is, the meet and confer
25 process is to actually talk through

1 these issues, right? We can cabin 14
2 for now and start talking about some of
3 the other categories of information and
4 maybe there's agreements to be reached.

5 MR. FARRELL: So two things:
6 Number one is discovery ruling number 3
7 takes transactional data back to January
8 1, 1996 but that's not relevant because
9 in this first set of initial discovery
10 that we served, we're not asking for
11 transactional data. That is a separate
12 set of discovery that is the domain of
13 Peter Mougey.

14 When we drafted this initial set
15 of discovery, what we're attempting to
16 do is define the parameters of the
17 relationships between ESI and the
18 manufacturers, the distributors, the
19 dispensers and the plan sponsors, and so
20 it's difficult for us to agree in a
21 vacuum whether or not it's burdensome or
22 convenient for you to go back so far
23 when you haven't even given us your
24 history of acquisitions and mergers,
25 whether or not you have predecessor

1 liability and what your corporate
2 structure looks like.

3 It's difficult for us to agree to
4 a temporal limitation when some of your
5 responses that you are telling us
6 yesterday on the call are limited to
7 just a division of your corporation, not
8 even a subsidiary or a sister
9 corporation, but you've pigeon-holed
10 your responses into certain divisions
11 and certain services provided by your
12 corporation, so, and then the final
13 piece of it is you're pigeon-holing your
14 responses and arguments based on only
15 one of the defendants that we named. So
16 perhaps there is some wisdom into
17 waiting for the motion to be granted;
18 but I can tell you that if the motion is
19 granted, we believe the baseline should
20 be January 1, 1996 and I don't see us
21 budging from that position.

22 MS. VIEIRA: Well, just to be
23 clear, the transactional deadline was
24 later moved from 1996 to 2006 to be
25 consistent with the ARCOS data, so

1 that's where I was getting that from;
2 but, for example, your request, you
3 request contracts with pharmacies,
4 contracts with plan members or with
5 clients. Those sorts of things are
6 included in here and I don't hear any
7 discussion about why that would be
8 relevant and why that would need to go
9 back as far as the '90s.

10 I think that that would, those --
11 that's just an example of something that
12 would be related to your I would say
13 PBM, more PBM specific issues and I
14 can't imagine why you would need
15 contracts that would go so far back, so
16 that's kind of what I was trying to get
17 at is that talk through the issues that
18 are more specific here. That's just one
19 example. The contracts with pharmacy.

20 The contracts with -- well, I
21 don't think there are any contracts with
22 distributors, but that's another
23 request.

24 MR. FARRELL: No, but see that's
25 the point. There are contracts with

1 distributors. It's just not, it's not a
2 particular division of your corporation
3 that you're willing to admit is involved
4 in this litigation.

5 MS. VIEIRA: No. We have one
6 corporate entity, Express Scripts PBM,
7 that does not have contracts with any
8 distributors. That is an entity, not a
9 division of a company. That's an
10 entity.

11 MR. FARRELL: So Optum has
12 divisions within OptumRX that is the
13 mail-order pharmacy and Optum is
14 refusing to answer questions on behalf
15 of a division of OptumRX.

16 MS. MCGOWAN: And Paul, I think
17 we -- this is Emily McGowan for OptumRX,
18 and we discussed this yesterday as well.
19 Our position is that the mail-order
20 pharmacy is not in the case until the
21 amendment ruling and so we are
22 responding on behalf of the PBM.

23 If the complaints are amended and
24 the plaintiffs pursue allegations
25 against the mail-order pharmacy, then we

1 would have to consider those discovery
2 requests in that light.

3 MR. BOONE: And, Paul, this is
4 Brian Boone for OptumRX. I think we
5 even went further than that and we said
6 assuming that the mail-order pharmacy
7 gets added, we think there is some
8 contract between the mail-order pharmacy
9 and a distributor or maybe multiple
10 distributors over time and we can have
11 that conversation then, so we gave you
12 that information even ahead of the
13 amendment ruling.

14 MR. FARRELL: I understand that.
15 I think that makes the point as to why I
16 believe it's relevant that we ask for
17 the contracts dating back to January '96
18 because we believe they're relevant.

19 Olga on behalf of ESI is taking
20 the position that it's not relevant
21 because it's not in the case yet; so
22 having discussions about theoretical
23 rulings by the Court as the basis for
24 where we're willing to draw the temporal
25 line is just not very effective.

1 We believe that the January 1,
2 1996 line in the sand is the starting
3 point for us to have these further
4 discussions and that's why -- and you
5 saw the email that I sent -- we cite to
6 numerous paragraphs in our amended
7 complaint that reference it.

8 So as of right now what you're
9 asking me to do is to limit the temporal
10 limitation based upon the old complaint
11 and ignoring the implications of the new
12 complaint as if that for some reason
13 would define the scope of discovery.

14 We don't believe that it does,
15 first of all. We believe that discovery
16 is broader and allows us to go back and
17 to look at these things and the history
18 of the relationships between your
19 companies and the manufacturers of
20 prescription opioids.

21 SPECIAL MASTER COHEN: This is
22 David.

23 MS. VIEIRA: But --

24 SPECIAL MASTER COHEN: My sense
25 is that you're not -- one second.

1 My sense is that you're not going
2 to reach any agreement through, if this
3 is what you're doing, conferring and
4 meeting right now. It almost sounds a
5 little bit like you're stumping or
6 talking to me, and I get that, but what
7 I'm hearing is that you're not going to
8 resolve this today.

9 MR. FARRELL: Correct.

10 SPECIAL MASTER COHEN: And
11 probably not before a motion to amend
12 the complaints is ruled on and maybe not
13 even then, and so I just wonder if
14 there's something else that might be
15 more productive that you could talk and
16 chat about.

17 MR. FARRELL: Yes. What I'd
18 like to do is I'd like to talk about the
19 process because Brian Boone has
20 mentioned again a Rule 37 motion and so
21 I circulated earlier today the
22 appointment order with the authority of
23 the Special Master as well as a footnote
24 that described the process that Judge
25 Polster himself wrote as to the process

1 that we're accustomed to.

2 We are in a position, and we have
3 put Optum on notice, that we believe
4 there is a substantial DR 22 violation
5 and we would like to tee that up; and so
6 if it requires a formal motion, I just
7 would like to know whether we need to
8 file it, whether we're going to continue
9 with the process that you have used in
10 the past that Judge Polster has adopted
11 or whether or not it makes more sense
12 for us to just file the motion directly
13 with Judge Polster.

14 SPECIAL MASTER COHEN: Well, and
15 what I saw was just filed and it was
16 that. It was a notice. I think it
17 makes sense for some time to be allowed
18 for the PBMs to respond which may be
19 anything from acknowledgment and here it
20 is to disagreement that they're required
21 to do that and in any event I would
22 imagine at the very least get an email
23 from them and we can go from there.

24 Go ahead, Brian.

25 MR. BOONE: Yeah. This is Brian

1 Boone for OptumRX.

2 I was just about to say we just
3 got the letter this morning and we're
4 going to work up a response. I haven't
5 even had a chance to read it all the way
6 through, to be honest with you, so I
7 don't think it's appropriate to talk
8 about it today. We'll respond. After
9 that if the parties have a dispute, we
10 can go from there.

11 SPECIAL MASTER COHEN: Okay. I
12 get that plaintiffs are anxious at the
13 bit to get going. That's the nature of
14 plaintiffs and that they want to move
15 the litigation along. I'm fine with all
16 of that but we have to go through the
17 process and as I've said now several
18 times, the process at the very least is
19 going to include allowing parties to
20 respond in writing informally or
21 formally and present their positions and
22 we'll run it up the flag pole as much as
23 we need to, but I'm certainly not going
24 to receive a letter from one side, get
25 the parties on the phone and then rule

1 unless it's, you know, exigent.

2 MR. FARRELL: And, David, to be
3 clear, I've never, that's never been the
4 practice nor is that what I'm asking.

5 What I'd -- when I sent the
6 letter today, the deficiency letter
7 today, what I was expecting was the
8 process that we've been using the past
9 six or seven years with responding back
10 to each other, and then bring -- just
11 like the footnote says, bringing it to
12 you, raising it, you offering insight
13 and then if we don't agree, we letter
14 brief it and then you issue a ruling.
15 Then if the parties want that ruling
16 placed in writing or formalized, then
17 you issue a formal discovery ruling
18 within three days and then it gets
19 appealed to Judge Polster. That's the
20 process that I thought we were
21 following.

22 What I'm hearing Brian Boone
23 yesterday and today state is that he
24 wants us to formally follow the Rule 37
25 process and file a motion with the Judge

1 directly.

2 MR. BOONE: So Paul, this is
3 Brian Boone again for OptumRX.

4 What you just described as the
5 process is not what you did in this
6 case. You copied Special Master Cohen
7 on the very first communication about DR
8 22. So you didn't talk to us separate
9 from Special Master Cohen. You included
10 him from the very beginning.

11 It seems like you all are trying
12 to shortcut all of these meet and confer
13 obligations and really what the
14 discovery rules require to accelerate
15 disputes without even giving us really a
16 chance to respond. And I hear you,
17 Special Master Cohen, saying you're not
18 going to allow that. We're going to
19 have an opportunity to respond. And we
20 can meet and confer.

21 I'm going to send a letter back
22 to you at some point and then we can
23 talk about whether there's a dispute,
24 but I guess, Paul, I would ask you the
25 question are you saying that Rule 37

1 does not apply in these cases?

2 MR. FARRELL: No. What I'm
3 confused about, Brian, is whether or not
4 you intend to follow the process of
5 resolving discovery disputes that we've
6 been using with discovery rulings and
7 mandates from the court for six years or
8 whether or not you believe that this is
9 a process that should not go through
10 Special Master Cohen and instead should
11 be a formal Rule 37 filed directly with
12 Judge Polster.

13 SPECIAL MASTER COHEN: Well, let
14 me jump in because a couple things that
15 I'll say, Brian.

16 One is, again, this has been
17 something that I think has evolved, and
18 when I say "something," that is that it
19 got to the point where the parties would
20 send letters like Paul just sent to you
21 to me just to keep me apprised of what's
22 going on. I'm not going to respond to
23 that. It's one party's position. I get
24 to read it. And then the defendants
25 respond. I get to read it. I begin to

1 see whether there's something brewing or
2 not.

3 If eventually it requires my
4 attention, we would create, we created
5 something called a discovery agenda that
6 in the height of things was going out
7 once a week and it was a listing of
8 every single discovery dispute, every
9 single email and letter that had gone
10 back and forth between the parties that
11 any party wanted to include was attached
12 as an exhibit and once a week I would
13 hold a, have a discussion with the
14 parties and we would work our way
15 through it; and so what I understood
16 Paul's email to me to be was that. It
17 was, hey, here's an issue, here's our
18 submission. And my expectation was not
19 that we would have to talk about it at
20 all during this call, but that
21 eventually defendants would respond,
22 probably via email to me, perhaps with a
23 letter, perhaps with just an email,
24 whatever it is, and we go from there.

25 But the process is what it is.

1 The process is that. It's going to
2 happen that way. If eventually it
3 climbs the ladder from email to position
4 letter to formal Rule 37 motion, then
5 fine, but it doesn't need to start
6 there.

7 And often doesn't need to start
8 there because it gets resolved one way
9 or another before that. And the whole
10 function of that process is, A, to keep
11 things moving more quickly and, B, to
12 save the parties money, save all of your
13 clients money. I know what it costs to
14 put together a motion to compel, a
15 response and a reply. That's a lot of
16 money.

17 MR. BOONE: Thanks, Special
18 Master Cohen.

19 SPECIAL MASTER COHEN: Sure.

20 MR. BOONE: Thanks for your
21 comment. I guess all that I was saying
22 was, I mean, I'm like I have never had
23 any case in which the opposing party
24 went immediately to the special master
25 without meeting and conferring about an

1 issue and it seems like this is the
2 practice with the PEC which seems out of
3 bounds to me.

4 But in any case, all, I guess the
5 other thing I'm saying is we can talk
6 about the process, we can talk about a
7 briefing schedule, again assuming
8 there's a dispute at the end of all of
9 this where we're never going to agree to
10 something less than our client is
11 entitled to under the Federal Rules,
12 including Rule 37, and again that's not
13 saying that we won't participate in the
14 process, and we can talk about the
15 process; but so far the process hasn't
16 played out in the way that Mr. Farrell
17 has suggested it should play out.

18 SPECIAL MASTER COHEN: Well, I
19 agree that running to me first early and
20 quickly isn't necessarily always the
21 best way to go and that perhaps more
22 discussion and back and forth between
23 the parties especially in the beginning
24 as they get to know each other, which
25 tends to take a longer period of time

1 than it does later on when everybody
2 does know each other, might not be a bad
3 idea; but I have, I've described how I'm
4 kind of receiving that information.

5 I still want to get back though
6 to -- we keep getting away from it --
7 any specific discovery requests
8 regarding which you all might be able to
9 discuss something and resolve it.

10 You've made process on geographic.

11 You've staked out your positions on
12 temporal and it sounds like it needs to
13 wait a ruling at the very least before
14 we can get into the details, although
15 there may be some bits that you can talk
16 about.

17 Anything else?

18 MR. FARRELL: From the
19 plaintiffs' perspective, the substance
20 of the individual responses are subject
21 to extensive deficiency letters that we
22 need to meet and confer with.

23 I don't anticipate those meet and
24 confers to be fruitful until we get
25 resolution of the motion to amend, until

1 we get resolution of the temporal
2 limitation. I do think that the DR 22
3 is something that's independent of all
4 that and it needs to take its own
5 process.

6 And, again, I want to make this
7 as perfectly clear as I can: I'm not
8 running to the Special Master because I
9 never lose and I think I'm going to win.
10 I'm going to the Special Master because
11 I want clarification that we're going to
12 follow the process that we've been using
13 for six years, and that the lawyers for
14 OptumRX have said yesterday and today
15 that they're not, that they are not
16 interested in abiding by the prior
17 procedural rulings and they want to
18 utilize Rule 37.

19 So the reason DR 22 is being
20 mentioned is because it is ripening and
21 the process is going to be either we
22 file a direct motion under Rule 37 or we
23 come and we use the process that has
24 been used for six years in this
25 litigation.

1 I prefer to use the process, but
2 if the defendants are going to make the
3 point that until they're told by Judge
4 Polster that this is the process that
5 we're going to use, we will go see Judge
6 Polster and ask him that question; but
7 as you can see right off the bat, we're
8 already manipulating words and taking
9 strong positions that is disappointing
10 and that what we need is we need some
11 clarity on what the process is and we
12 will abide by it as we always have.

13 SPECIAL MASTER COHEN: I hear the
14 defendants saying -- this is David.

15 I hear the defendants saying only
16 that they are not giving up their right
17 to file a formal Rule 37 motion and that
18 they're willing to go through the
19 process and this is going to sort itself
20 out as we move forward; so with regard
21 to the, in particular, the DR 22 letter
22 that you just sent, whether they copy me
23 or not, the defendants will respond to
24 you, they'll either say you're right,
25 here's the stuff you want or you're

1 wrong, we're not going to give it to
2 you. You can bring it to me and I'll
3 tell you. Either I'll say look, here's
4 what I think it is. I'm ruling this.
5 If you, either side objects, tell me to
6 put it in writing and we'll take it to
7 the court and it will be, if necessary,
8 in the form of a motion to compel; but
9 let's, you know, ratchet it down, take
10 our time. It will resolve itself. It
11 will work out.

12 MR. BOONE: Thank you, Special
13 Master Cohen. This is Brian Boone.

14 Just one thing to add, just to be
15 clear, I'm saying that Rule 37 and all
16 the other rules apply to all the
17 parties, not just to us, not just to the
18 plaintiffs, to everybody and that we're
19 all entitled to whatever rights we have
20 under those rules and we're going to
21 preserve those rights. Again, we're
22 going to talk through the process but we
23 still have those rights just like the
24 plaintiffs do.

25 MR. WEINBERGER: This is Pete

1 Weinberger.

2 I just want to add one other
3 thing because the impression that I'm
4 hearing is in terms of how we've used
5 this for the last six-and-a-half years
6 is that only the plaintiffs have used
7 this process to involve Special Master
8 Cohen, when in fact every one of the
9 other 15 or so defendants have, in
10 protecting their clients rights,
11 understood the Appointment Order and the
12 scope of the responsibilities and duties
13 and powers of the Special Master to do
14 exactly what it is that we said has been
15 done and what we did in this particular
16 instance, and, you know, we hear Special
17 Master when he says perhaps at this
18 point it was a bit too quick or maybe
19 premature; but any suggestion,
20 Mr. Boone, that this is something that
21 only the plaintiffs initiate or in some
22 ways take advantage of is inappropriate,
23 improper and not true and I would
24 suggest that you contact the many
25 defense counsel who have been in this

1 case for six-and-a-half years and ask
2 them whether what I just said is true.

3 MR. BOONE: Peter, this is Brian
4 Boone.

5 I didn't say anything to the
6 contrary of what you just said. I'm not
7 talking about what other defendants have
8 done or not done in other tracks. We
9 haven't been in other tracks, which is
10 why, again, Judge Polster said that
11 previous rulings don't technically apply
12 to us and we're going to hash all of
13 that out; but I'm not suggesting, I
14 haven't said that only the plaintiffs
15 have used the process that you and Paul
16 have described. I don't think I ever
17 even suggested that.

18 SPECIAL MASTER COHEN: So I'm
19 not sure there is anything else I can do
20 today to help you all or to educate
21 myself unless somebody else again wants
22 to point to a specific dispute that they
23 think that they can work through.

24 MR. FARRELL: And the only thing
25 that I would ask is that, Optum, can you

1 give us a time frame in which you expect
2 to respond to our letter of today?

3 MR. BOONE: We can give some
4 thought to it, Paul, and I'll send an
5 email by the end of today. Does that
6 work?

7 This is Brian Boone for OptumRX
8 by the way.

9 MR. FARRELL: Yeah. It doesn't
10 need to be by the end of the day. I
11 know I put forth a lot for you to think
12 about. I just, I don't want this to be
13 an open-ended. I'd like us to figure
14 out some time frame in which we're
15 either going to figure out a resolution
16 to this or we're going to present formal
17 position papers.

18 MR. BOONE: Yeah. Understood.
19 I wasn't saying that we would respond by
20 the end of the day. I was saying that I
21 could send an email telling you when we
22 would respond, and I would send that
23 email by the end of the day; but
24 understood.

25 MR. FARRELL: That's fine.

1 That's all I have, Special Master Cohen.
2 This is Paul Farrell.

3 SPECIAL MASTER COHEN: Anybody
4 else?

5 MR. MOUGEY: Yeah. This is
6 Peter Mougey.

7 I just would like to give out a
8 couple thoughts on, for everybody to
9 think about on how to proceed.

10 My letter again was attempting to
11 lay out a proposed structure on what I
12 would consider to be a highly likely
13 thought that positions aren't going to
14 be agreed to for all the parties on
15 every single piece and all I would like
16 to do is keep on track and keep on
17 schedule and I'm sure that we all would
18 like to keep on track and keep on
19 schedule with discovery closing and as
20 we get into later in the year with
21 depositions, that production is not
22 coming out right on top of depositions
23 from either side and that we're all
24 sticking to the schedule; and in order
25 to do that, I think we need to get

1 started as soon as we can with resolving
2 disputes.

3 I'm not suggesting the time is
4 right now. I'm not suggesting the time
5 is tomorrow or next week, but I would
6 like to ask that we start looking at
7 schedules to address these issues later
8 in the month and let everything ripen.
9 Let's have the, whether it be, you know,
10 letters, briefs, whatever track or
11 whatever position that we're, or
12 whatever process we're going to adopt,
13 which quite frankly is what's already
14 been laid out by the Court is, makes
15 sense to me.

16 Let's go ahead and set a
17 schedule. Whether that's today or next
18 week, next week is fine, but I do think
19 we need to start looking at what those
20 schedules need to be so we can hold our
21 dates. I think it's that simple. And
22 that's all I'm trying to do with the
23 letter that we laid out is have
24 everybody start to look at what our
25 dates are, hold the dates for, I'm going

1 to call them hearings, whether those be
2 Zoom or in person or whatever, however
3 we do them, or a combination of the two;
4 but that we start to hold dates because
5 if we wait to look at this until late
6 this month/early March, this is going to
7 end up spilling over into April when we
8 get everybody with clear dates.

9 So all I'm asking to do is we
10 hold some dates, set some things aside.
11 If we need them, great. If not, that's
12 even better, but a little planning in
13 the short term I think is going to help
14 us all have a much more organized
15 litigation process over the coming year.

16 MR. BOONE: And I --

17 SPECIAL MASTER COHEN: I
18 appreciate looking forward -- I'm sorry,
19 Brian. This is David.

20 I appreciate your making that
21 suggestion. I think that we will have
22 to address that. You know, how are we
23 going to deal with the inevitable
24 disputes, how often are we going to
25 meet, where are we going to meet and I

1 agree that we should all think about
2 that, and I know I will.

3 Let me ask a question: Do the
4 plaintiffs think -- since that's what we
5 seem to be talking about at the moment.

6 Do the plaintiffs believe that
7 there are any disputes that are
8 intractable and therefore a position
9 letter is something that they can put
10 together now? And you know what? You
11 really don't even have to answer that.
12 If the answer is yes, then do it. If
13 the answer is no or if you really think
14 that you have to wait for the motion to
15 amend to be ruled on, then fine; but if
16 there are some issues that the belief,
17 the good faith belief is that meeting
18 and conferring will not resolve them and
19 it doesn't need to wait on that ruling,
20 then get your position letter written
21 and let's get going.

22 MR. BOONE: Special Master
23 Cohen, this is Brian Boone for OptumRX.

24 Before you made your comment, I
25 was going to say I think the premise of

1 Peter's letter, I think he even said it
2 explicitly, was that the meet and confer
3 process had not proven fruitful.

4 We've had exactly one call
5 yesterday about all of this and so I
6 think we should let the meet and confer
7 process play out a little more before we
8 start drawing those hard conclusions
9 about the fruitfulness or
10 ineffectiveness of talking about these
11 issues.

12 SPECIAL MASTER COHEN: Well, I
13 agree with that. It certainly needs to
14 be given a chance.

15 MR. MOUGEY: I think -- this is
16 Pete Mougey. I think we all agree that
17 it needs to be given a chance but this
18 is the second or third time they've said
19 we've had one meet and confer and I just
20 don't think that -- again, that's not
21 accurate.

22 We've had meet and confers over
23 data which spill over into these same
24 issues on temporal scope, on the global
25 nature and we've had multiple meet and

1 confers; so again I'm not saying that
2 that process shouldn't run its course
3 and that we shouldn't continue talking
4 because I think we should continue
5 talking for the next year. It makes
6 sense.

7 However, this isn't one meet and
8 confer, as Brian suggests; it's not one
9 letter, as Brian suggests. It's been
10 multiple meet and confers and some of
11 this even spills into we were
12 negotiating the CMO; and some of these
13 conversations go back to pre holidays,
14 early December, and have now, are now
15 two months in and we're getting the same
16 answers and so I disagree this is
17 somehow brand new this week, but do
18 agree that we should continue to talk.
19 And all I'm asking is over the next week
20 or two can we start setting aside some
21 dates to handle the inevitable, the
22 inevitable disagreements over what
23 discovery is for both sides. And it's
24 that simple. So this is not something
25 that's just popped up over the last few

1 days that we're all of a sudden just
2 unleashing the hounds on having these
3 conversations.

4 These conversations have been
5 going on the same, some of the same
6 themes on the defense side and the
7 plaintiffs side that we're butting heads
8 and it's causing us problems with moving
9 forward. That spills into the data
10 conversations. It spilled into -- it
11 came from the CMO conversations on the
12 call we had with you in early, I think
13 it was early to mid December if I
14 remember correctly, so this, these have
15 now going on almost two months old.

16 SPECIAL MASTER COHEN: Well,
17 look, I appreciate that you will all
18 continue to meet and confer.

19 Until I have something to chew
20 on, and so far I don't. Until I have
21 positions from both sides and questions
22 that I can ask and understandings of the
23 issue, it feels a little premature to
24 set a date to have a hearing when there
25 is no issue ripe to have a hearing on.

1 Now, having said that, of course
2 there will be issues, of course we
3 should think about setting aside time
4 for the issues that will surely arise.
5 I get that. I agree with it. But right
6 now I'm just waiting to get my hands on
7 something. I don't have anything in my
8 hands yet. So either tee it up or meet
9 and confer so that you can tee it up and
10 then we'll go from there.

11 MR. FARRELL: This is Paul
12 Farrell.

13 What my plan is is to give ESI
14 some time to respond to the deficiency
15 letter that we sent and then to start
16 having substantive discussions with
17 them.

18 Optum is probably four or five
19 days behind that. Their deficiency
20 letter just went out yesterday maybe and
21 so they'll probably need a little bit
22 more time to read through what we think
23 the faults are in their responses and so
24 I would imagine that process will
25 probably take at least the rest of this

1 this week and next week before we can
2 tee up the substantive issues.

3 The temporal scope I think needs
4 to wait on the motion to amend to be
5 ruled upon and then it will be fairly
6 quick to ripen that up; and so what
7 we'll do is we'll begin building an
8 agenda for you when we believe it's time
9 to start formal position papers; and so
10 what Peter's suggesting is that it's
11 been useful for us in the past to have
12 conversations like this with you, and
13 I'm open to whatever it is the PBMs and
14 Special Master wants to do for further
15 discussions.

16 SPECIAL MASTER COHEN: Okay.
17 And, you know, as far -- I'll make one
18 last comment and then I think we should
19 all hang up and that is that if there is
20 agreement as to a late temporal
21 limitation as to a certain request.
22 Okay? I'm just making this up: Let's
23 say that on request 79 the PBMs both
24 agree that starting in 2006 they should
25 produce documents; going back to 1996 is

1 not appropriate and you guys are
2 ossified about that but it might depend
3 on a motion to amend, fine.

4 What that means is there's
5 agreement. There's agreement on 2006
6 and later. So do that unless there's a
7 reason you shouldn't. Unless it would
8 be very inefficient to do it for that
9 period of time and then go back and do
10 it for the earlier period of time if
11 things change.

12 But there is some level of
13 agreement on that issue, so start
14 producing. Again, roll stuff out.
15 Start the process, and that goes both
16 ways. That example was because that's
17 the one in mind. But same goes for
18 plaintiffs. To the extent there is an
19 understanding agreement as to what is
20 properly produced, do it.

21 Okay, everybody, thank you for
22 your time and --

23 MR. SHKOLNIK: Special Master,
24 just on that --

25 SPECIAL MASTER COHEN: -- I look

1 to forward --

2 MR. SHKOLNIK: Special Master
3 David, this is Hunter.

4 I just want to point out that I
5 think for at least from the plaintiffs
6 standpoint, we have been rolling out --
7 we're providing, so we're not holding
8 back, we're not fighting with them on
9 this issue. It really hasn't come up
10 but we'll meet and confer with them if
11 there's issues with what we're
12 producing. Thank you.

13 SPECIAL MASTER COHEN: Okay,
14 everybody, thank you for your time and
15 have a good rest of the day.

16 - - - -

17 (Proceedings concluded at 3:12 p.m.)



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C E R T I F I C A T E

I, Pamela S. Greenfield, a Notary Public within and for the State of Ohio, do hereby certify that I attended the foregoing proceedings in their entirety, that I wrote the same in stenotypy, and that this is a true and correct transcript of my stenotype notes.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office, at Cleveland, Ohio, this 15th day of February, 2024.

 
Pamela S. Greenfield, RPR, RMR, CRR, RDR
Notary Public, State of Ohio
My commission expires July 2, 2028

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